In the Supreme Court of the United States.

OCTOBER TERM, 1900.

FRANK M. FAIRBANK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 226.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The question raised is the constitutionality of that provision of the act of June 13, 1898 (30 Stat., 448), known as the "war revenue act," which lays a stamp tax or duty of ten cents upon—

> Bills of lading or receipt (other than charter party) for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place.

The plaintiff, an agent of the Northern Pacific Railroad Company at Minneapolis, was indicted, tried, and convicted of the offense of issuing a bill of lading for

certain wheat to be exported from Minneapolis to Liverpool, without affixing the 10-cent stamp required by law. The railroad company has carried the case here to test the constitutionality of the law.

THE LAW.

The following are the material parts of the act, the italics being mine:

ADHESIVE STAMPS.

SEC. 6. That from and after the first day of July, eighteen hundred and ninety-eight, *there shall be levied, collected, and paid, for and in respect of* the several bonds, debentures, or certificates of stock and of indebtedness, *and other documents, instruments*, matters, and things *mentioned and described in Schedule* A of this act, *or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed* by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

SCHEDULE A.

STAMP TAXES.

BILL OF LADING—EXPORT.

Bills of lading or receipt (other than charter party) for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents.

* * * * *

CUSTOMS-HOUSE MANIFEST.

Manifest for custom-house entry or clearance of the cargo of any ship, vessel, or steamer for a foreign port—

If the registered tonnage of such ship, vessel, or steamer does not exceed three hundred tons, one dollar.

Exceeding three hundred tons, and not exceeding six hundred tons, three dollars.

Exceeding six hundred tons, five dollars.

* * * * *

PASSAGE TICKET.

Passage ticket, by any vessel from a port in the United States to a foreign port, if costing not exceeding thirty dollars, one dollar.

Costing more than thirty and not exceeding sixty dollars, three dollars.

Costing more than sixty dollars, five dollars.

* * * * *

WAREHOUSE RECEIPT.

Warehouse receipt for any goods, merchandise, or property of any kind held on storage in any public or private warehouse or yard, except receipts for agricultural products deposited by the actual grower thereof in the regular course of trade for sale, twenty-five cents: *Provided, That the stamp duties imposed by the foregoing schedule on manifests, bills of lading, and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America.*

It is contended that the stamp tax thus laid upon bills of lading or receipt for goods to be exported violates the

fourth clause of section 9 of article 1 of the Constitution, which reads:

> No tax or duty shall be laid on articles exported from any State.

And it is submitted that the cases of *Brown* v. *Maryland* (12 Wheaton, 419) and *Almy* v. *California* (24 Howard, 169) are controlling and conclusive as against the Government.

ARGUMENT.

I.

I have had occasion more than once to call the attention of the court to the breadth of the taxing power conferred upon Congress by the Constitution. Subject to the exception that Congress can not tax articles exported from any State, and to the limitations that it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of geographic uniformity, the power vested in Congress reaches every subject and may be exercised at discretion. (The License Tax Cases, 5 Wall., 462, 471.)

The question for consideration is, therefore, the meaning and effect of the prohibition,

> No tax or duty shall be laid on articles exported from any State.

Observe carefully the phraseology. Congress is not prohibited from laying a tax or duty on "exports," but on "articles exported from any State." The language chosen indicates the evil the convention intended to prevent, which was the inequality which would result in-

evitably from the selection by Congress of certain articles of export for taxation. At the time the Constitution was being framed there were no articles of export produced generally throughout the Union. The great staples of the South were not produced to any substantial degree in the North. And the reverse was true. It was apparent, therefore, in view of this variety in the production of articles for export, that it would be impossible, in the application of an export duty, to select articles for taxation so as to secure and preserve uniformity of burdens as among the several States. An export tax on cotton would fall on the South, and, with the knowledge then existing, could not be counterbalanced by an export tax on any product of the North. To give Congress the power to lay a tax or duty "on articles exported from any State," meant to authorize inequality as among the States in the matter of taxation. If the North happened in control in Congress, it might tax the staples of the South; if the South were in power, it might place a duty on the exports of the North. As a part, therefore, of the great compromise between the North and the South, this clause was inserted in the Constitution. The prohibition was applied not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or duty on the *articles exported*, for these could not be taxed without discriminating against some States and in favor of others.

There is an elaborate discussion of "The grand compromises of the Constitution respecting commerce, exports, and the slave trade," in the recent edition (Harper

& Brothers, 1895) of George Ticknor Curtis's Constitutional History of the United States, chapter 26, volume 1, page 494 et seq. I quote the following (pp. 496, 497):

> At the time of the formation of the Constitution of the United States there was not a single production common to all the States of sufficient importance to become an article of general exportation. Indeed, there were no commodities produced for exportation by so many of the States that a tax or duty imposed upon them on leaving the country would operate with anything like equality even in different sections of the Union. In fact, from the extreme northern to the extreme southern boundary of the Union the exports were so various, both in kind and amount, that a tax imposed on an article the produce of the South could not be balanced by a tax imposed upon an article produced or manufactured at the North. How, for example, could the burden of an export duty on the tobacco of Virginia, or the rice or indigo of South Carolina, be equalized by a similar duty on the lumber, or fish, or flour of other States? Possibly, after long experience and the accumulation of the necessary statistics, an approach toward an equality of such burdens might have been made, but it could never have become more than an unsatisfactory approximation; and while the effect of such a tax at one end of the Union on the demand for the commodity subjected to it might be estimated—because the opportunity for other nations to supply themselves elsewhere might be so precise as to be easily measured—its effect at the other end of the Union, on another commodity, might be wholly uncertain, because the demand from abroad might be influenced by new sources of supply, or might from accidental causes continue to be nearly the same as before.

The object of the prohibition is clearly expressed in Rawle on the Constitution, page 115:

> It has been repeatedly observed, that the leading principle of the whole Constitution is uniformity in respect to the several States, so far as it can be obtained. The natural or artificial products of States are different—to lay a general duty on the exports of rice or cotton, or tobacco, would affect only the Southern States; on flour or grain, principally the Central States, and on the domestic manufactures would operate chiefly on the Northern and Eastern States engaged in them—yet without this restriction perhaps it might have been done.

To the same effect see 1 Story on the Constitution, section 1014.

Mr. Tucker, in his work on the Constitution, says (vol. 1, p. 469, sec. 221):

> An important limitation upon the power of Congress to lay and collect taxes, duties, etc., is expressed in these words: "No tax or duty shall be laid on articles exported from any State." This is a part of the great compromise made between the North and the South, the commercial and the planting States. At that time, as now, a large mass of the exports of the country consisted in the great staples of the South. To have left to Congress the power to tax the staples of the great exporting States of the Union would have enabled the majority of Congress to tax the minority, representing the planting States, to an oppressive extent.

The object of the exception, therefore, was to secure uniformity in matters of taxation among the several States, and the means was the prevention of a tax or duty upon articles exported from any State. To come

within the intent of the prohibition *the tax must fall upon the articles exported*. There must be a selection of articles of export for taxation, with the resultant discrimination against the State or States exporting them.

II.

Having examined briefly the history and purpose of the prohibition, let me for a moment refer to the case of *Almy* v. *California* (24 How., 169), which is relied upon for the purpose of showing that the tax or duty involved in that case was really *a tax upon the articles for which the bill of lading was issued*. The Constitution provides that no State shall without the consent of Congress lay any imposts or duties on imports or exports. The Supreme Court held that the stamp tax imposed by the California act amounted to a duty upon the gold or silver exported, and therefore violated this provision of the Constitution. Subsequently, in *Woodruff* v. *Parham* (8 Wall., 123), this court held that the decision in *Almy* v. *California* was placed on the wrong ground; that as it involved a shipment from San Francisco to New York the tax could not be held invalid as a tax or duty upon exports, because the gold and silver did not constitute exports, not being shipped to a foreign port, but that the tax was invalid because it amounted to a regulation of interstate commerce.

Almy v. *California* was rightfully decided for two reasons:

In the first place, two articles of export were selected to be taxed, namely, gold and silver.

In the second place, the stamp tax laid upon bills of lading for gold or silver was graded according to the value of the gold or silver to be shipped out of the State.

This latter fact does not appear in the case as reported, but Mr. Benjamin, in his brief, gives the language of the California act of April 26, 1858, levying the tax as follows:

> The following duty or stamp tax is hereby imposed on every sheet or piece of paper, parchment or other material, upon which may be written, printed, engraved, or lithographed, or other means of designation, of either of the following-described instruments, to wit: Any bill of lading, contract, agreement, or obligation for the transportation or conveyance from any point or place in this State, to any point or place without the limits of this State, of any sum, amount, or quantity of gold or silver in bars or other form, by or between any person or persons, firm or firms, corporation or corporations, or other associations, either as principal or agent, or attorney or consignee, or consignor, to wit: *for one hundred dollars, thirty cents; and all sums over one hundred dollars, a stamp tax or duty of one-fifth of one per cent upon the amount or value thereof;* the payment whereof to be included in the bill of lading, contract, or agreement, or obligation for the transportation or conveyance thereof, as in this section provided, having attached thereto or stamped thereon a stamp or stamps expressing in value the amount of such tax duty, etc.

The California act, therefore, obviously laid a tax upon the articles to be exported, that is, upon the exports, because it selected particular articles, to wit, gold and silver, and taxed them according to the value of the

shipment. The fact that it made use of the bill of lading to lay the tax upon the gold or silver to be exported, is of course immaterial. The substance and not the form controls. (157 U. S., 581.) But this court, in deciding the case of *Almy* v. *California*, pointed out the provisions of the law to which I have referred as showing that the tax was intended to fall on the gold and silver and not on the bill of lading, Chief Justice Taney saying (bottom p. 174):

> In the case before the court, the intention to tax the export of gold and silver in the form of a tax on the bill of lading, is too plain to be mistaken. The duty is imposed only upon bills of lading of gold and silver, and not upon articles of any other description. And we think it is impossible to assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax on the gold and silver exported, while all other articles were exempted from the charge. If it was intended merely as a stamp duty on a particular description of paper, the bill of lading of any other cargo is in the same form, and executed in the same manner and for the same purposes, as one for gold and silver, and so far as the instrument of writing was concerned, there could hardly be a reason for taxing one and not the other.

In this connection, I call the court's attention to the case of *Pace* v. *Burgess, collector* (92 U. S., 372), in which it was held that a stamp tax on tobacco intended for export did not violate the clause of the Constitution which declares that "No tax or duty shall be laid on articles exported from any State." Mr. Justice Bradley

delivered the opinion, in the course of which he said (p. 375):

> The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. *It bore no proportion whatever to the quantity or value of the package on which it was affixed.*

III.

Referring to the language of Chief Justice Taney just quoted, I direct the court's particular attention to the fact that the stamp tax under consideration is not imposed upon any "articles of export," either from any State or from the United States, but simply upon the bill of lading or receipt for goods to be exported. The tax is purely and properly a stamp duty upon the instrument. While the tax upon a warehouse receipt is 25 cents, the tax upon a foreign bill of lading or receipt is only 10 cents. It does not matter what article is to be exported, nor the value of it. Every bill of lading or receipt for goods to be exported, no matter what the goods are, whether cotton, or rice, or wheat, or pork, or manufactured goods, and no matter from what State or port shipped, and no matter what their value, must have affixed the 10-cent stamp.

The tax, therefore, is a perfectly uniform one. It operates equally in every State from which any goods are shipped to foreign ports, and that means uniformly throughout the United States. There is no possibility of discrimination by the selection of particular articles of

export for taxation. The tax, in point of fact, is not a tax upon the articles to be exported, but is a tax upon the bill of lading as the evidence of a transaction.

Many taxes besides stamp duties are collected through the affixing of stamps, but this tax upon foreign bills of lading is a stamp duty proper, as defined by Dowell in his History and Explanation of Stamp Duties, page 7:

> Stamp duties properly so termed have three special characteristics:
>
> 1. They are charged on deeds or other written instruments;
>
> 2. They are collected by means of stamps impressed on or affixed to the instrument charged; and
>
> 3. The instruments charged have reference to, are, in fact, the evidences or records of acts or transactions more or less of a transitory nature, and not periodic in recurrence.

IV.

Having discussed the character of the exaction and shown, I trust, that it is a stamp duty proper, I beg now to call the court's attention to the fact that this tax has been used for over one hundred years, since the days when the men who framed the Constitution were in Congress making laws in order to execute its powers and carry out its purposes.

The act of July 6, 1797, entitled "An act laying duties on stamped vellum, parchment, and paper," provided (1 Stat., 527, 528) for the levying of the several stamp duties following, to wit:

> For any note or bill of lading for any goods or merchandise to be exported, if from one district to

another district of the United States, not being in the same State, ten cents; if to be exported to any foreign port or place, twenty-five cents, etc.

It was a stamp tax of two and one-half times the present tax, laid upon exactly the same thing. Respecting this act, this court, speaking by Mr. Justice White (*Knowlton* v. *Moore*, 178 U. S., 41, 56), said:

> The act of 1797 was adopted at a time when the founders of our Government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention, which framed the Constitution, must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds.

It does not appear in the debates that it ever occurred to any member of Congress that this stamp tax of 25 cents on foreign bills of lading violated the provisions of the Constitution forbidding Congress to lay a tax or duty on articles exported from any State. The reason is plain.

Stamp duties, as they are known to us, were first imposed in Holland in the year 1624 (Dowell on Stamp Duties, p. 12). The first English stamp act was passed in 1694 (Dowell, p. 15). This act provided for six several stamps or marks, indicating payments of 40s., 5s., 2s. 6d., 1s., 6d., and 1d., the different amounts of charge

for the instruments specified in the act. It was required that every instrument of the description specified should be written on paper (which includes vellum and parchment) previously stamped to denote payment of the proper duty. A variety of instruments were included under the following comprehensive heads, the amount of duty being 6d., namely:

> Charter party, policy of insurance, passport, bond, release, contract or other obligatory instrument, or any protest, procuration, letter of attorney or other notarial certificate (Dowell, pp. 18, 333).

I take it that these broad terms would cover a bill of lading, which is a contract acknowledging the receipt of goods and promising to transport and deliver them at a certain place.

Alluding to the comprehensiveness of the list of instruments liable to the original duties, Smollett observes that the act of 1694 extended to "vellum, parchment, and paper used in almost every kind of intercourse between man and man." (Dowell, pp. 48, 49.) The duties on bills of lading have continued to the present time and are still in force in England. In 1841 they were reduced from 3s. to 6d. (Dowell, p. 58), which is the rate now in force (Dowell, p. 192).

The application of these references to the history of the English stamp duty on foreign bills of lading is obvious. Our fathers who framed the Constitution were acquainted with the fiscal experience of England. They intended to give the Government of the United States authority to raise revenue by imposing stamp duties.

Mr. Luther Martin, in his letter to the legislature of Maryland, says (1 Elliott's Debates, 368):

> By the eighth section of this article, Congress is to have power to lay and collect taxes, duties, imposts, and excises. When we met in convention, after our adjournment, to receive the report of the committee of detail, the members of that committee were requested to inform us what powers were meant to be vested in Congress by the word *duties* in this section, since the word *imposts* extended to duties on goods imported, and by another part of the system no duties on exports were to be laid. In answer to this inquiry, we were informed that it was meant to give the General Government the power of laying stamp duties on paper, parchment, and vellum. We then proposed to have the power inserted in express words, lest disputes might hereafter arise on the subject, and that the meaning might be understood by all who were to be affected by it; but to this it was objected, because it was said that the word *stamp* would probably sound odiously in the ears of many of the inhabitants, and be a cause of objection.

The act of July 6, 1797, was repealed by the act of February 28, 1799, which changed the rate and phraseology of the stamp duty as follows (1 Stat., 622):

> Any note or bill of lading, or writing or receipt in the nature thereof, for any goods or merchandise to be exported, if from one district to another district of the United States, not being in the same State, four cents; if to be exported to any foreign port or place, ten cents.

Thus it is to be observed that the rate, ten cents, on a foreign bill of lading has existed from 1799 to the present time, whenever the stamp act has been in force.

The act of April 6, 1802 (2 Stat., 148), repealed all acts levying "internal taxes" in the following terms:

> That from and after the thirtieth day of June next, the internal duties on stills and domestic distilled spirits, on refined sugars, licenses to retailers, sales at auction, carriages for the conveyance of persons, *any stamped vellum, parchment, and paper*, shall be discontinued, and all acts and parts of acts relative thereto shall, from and after the said thirtieth day of June next, be repealed.

I do not find that the stamp duty on foreign bills of lading was reenacted until the war revenue act of 1862 was passed.

The act of August 2, 1813 (3 Stat., 77), levied stamp taxes upon promissory notes and upon inland and foreign bills of exchange. These duties were repealed by the act of December 23, 1817 (3 Stat., 401). Evidently Congress did not provide in the act of 1813 for the stamp tax upon foreign bills of lading because of the acts placing embargoes upon American vessels, interdicting commerce between England and France and the United States, and more especially the act of April 14, 1812 (2 Stat., 707), which prohibited the exportation of any specie, goods, wares, or merchandise of foreign or domestic growth or manufacture, etc., from the United States or the Territories thereof, in any manner whatever, to any place.

The act of July 1, 1862 (12 Stat., 432) contains, in the ninety-fourth section (p. 475) precisely the provision of the stamp duty on foreign bills of lading that is contained in the war-revenue act of 1898, being as follows:

SCHEDULE B.

STAMP DUTIES.

Bill of lading or receipt (other than charter party), for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents.

Duties similar to those imposed by the present act were also imposed upon manifests and upon passage tickets.

Section 151 of the act of July 30, 1864 (13 Stat., 291), continues in force these taxes or duties, the provision as to foreign bills of lading being in the precise language used in the present act.

These stamp duties were repealed by the act of July 14, 1870 (16 Stat., 257), and were not reenacted until the passage of the war-revenue act of 1898.

I have been informed by the Internal Revenue Bureau of the Treasury Department that the stamp tax on foreign bills of lading was never contested, but always collected.

V.

In the brief filed by Messrs. King it is claimed that the exemption which provides—

That the stamp duties imposed by the foregoing schedule on manifests, bills of lading, and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America—

violates the clause of the Constitution providing that all duties shall be uniform throughout the United States

and also that section which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

In the first place, this provision of the war-revenue act is not involved, because the bill of lading is for goods to be shipped from Minneapolis to Liverpool. But if the proviso were involved and is invalid, the court would so declare and leave the act stand without the exemption. The integrity of the tax is not destroyed by rejecting the exemption. The exemption, however, neither destroys the uniformity of the tax nor provides a preference to the ports of one State over those of another. Manifests, bills of lading, and passage tickets for goods or people on vessels sailing for ports in British North America are exempt from the tax. *It does not matter from what port of the United States the vessel sails.* There is no preference between ports or States of the United States. A vessel sailing from San Francisco to Vancouver, or from New Orleans to Halifax, comes under the exemption as much as a boat plying between Detroit and Windsor, or from Buffalo to Toronto. This answers also the objection as to the lack of uniformity. The tax is exacted uniformly in every place where a bill of lading is issued, and there is no preference given to the ports of one State over the ports of another. I may add that this exemption, in exact words, was in the acts of 1862 and 1864.

VI.

This contention of counsel that a preference is given by this regulation of commerce or revenue to the ports

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of one State over those of another, suggests the consideration that, if necessary, authority might be found for requiring a Government stamp to be placed upon all foreign bills of lading in the power given Congress to regulate commerce among the several States and with foreign nations, as well as in the power given to lay and collect taxes, duties, imposts, and excises.

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 3, 1900.

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